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No. 84-1905

# In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

*v.*

BUENTA M. OWENS, ET AL.

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

## BRIEF FOR THE APPELLANT

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## QUESTIONS PRESENTED

1. Whether provisions of the Social Security Act in effect between 1979 and 1983 that authorized payment of benefits to surviving widowed spouses, but not surviving divorced spouses, who remarried after age 60 violate the equal protection component of the Due Process Clause of the Fifth Amendment.

2. Whether, in this action for judicial review pursuant to 42 U.S.C. 405(g), the district court properly certified a nationwide class that includes persons who did not exhaust their administrative remedies and obtain a "final decision" of the Secretary on their claims for benefits or who received the final decision of the Secretary more than 60 days prior to the filing of this action.

## PARTIES TO THE PROCEEDINGS

The appellant is Margaret M. Heckler, Secretary of Health and Human Services.

The named appellees are Buenta M. Owens and Kenneth R. Owens. The district court certified a class, represented by those named appellees, consisting of (J.S. App. 31a):

> [A]ll persons who (1) were divorced from an individual who was covered under the Social Security Act and who predeceased the claimant; (2) remarried at age 60 or thereafter; and (3) have filed an application in accordance with the time frames described in Pub. L. No. 95-216, § 336(c)(1) and (2); and (4) have been or will be denied survivor's benefits, as surviving divorced spouses, for any month after December, 1978, *provided* that such persons (A) applied for such benefits on or after August 20, 1982, or (B) applied for such benefits prior to that date and either (i) had not received an initial decision denying those benefits prior to that date or (ii) had received an initial decision denying those benefits prior to that date and their right to seek administrative or judicial review of the denial of their benefits had not expired as of August 20, 1982.

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BUENTA M. OWENS, ET AL.

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA*

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## BRIEF FOR THE APPELLANT

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### OPINIONS BELOW

The December 23, 1983 order of the district court granting the Secretary's motion for summary judgment (J.S. App. 1a-12a) and the August 28, 1984 order of the district court certifying the class (J.S. App. 13a-28a) are unreported. The order of the district court holding the relevant provisions of the Social Security Act unconstitutional (J.S. App. 30a-43a) also is unreported.

### JURISDICTION

The judgment of the district court (J.S. App. 44a-46a) was entered on December 20, 1984, and the order of the

district court denying the Secretary's motion to alter or amend the judgment was entered on February 6, 1984 (J.S. App. 47a). A notice of direct appeal to this Court was filed on March 7, 1985 (J.S. App. 48a), and an amended notice of appeal was filed on March 8, 1985 (J.S. App. 49a). By order dated April 30, 1985, Justice Rehnquist extended the time within which to docket the appeal to and including June 5, 1985. The appeal was docketed on that date, and probable jurisdiction was noted on October 15, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1252.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment; Section 202(e)(1), (4), (f)(1) and (5) of the Social Security Act, 42 U.S.C. 402(e)(1), (4), (f)(1) and (5), as in effect between 1979 and 1983; and Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), are reproduced at App., *infra*, 1a-5a.

## STATEMENT

The Social Security Act was amended, effective January 1979, to permit a surviving *widowed* spouse who remarried after age 60 to receive monthly survivor's benefits based on the deceased spouse's earnings account. However, until January 1984, a surviving *divorced* spouse who remarried was not entitled to receive survivor's benefits based on the deceased former spouse's account. The district court held that this distinction in effect from 1979 through 1983 was irrational and therefore violated the Due Process Clause of the Fifth Amendment. The district court also ordered relief in this action under 42 U.S.C. 405(g) to a nationwide class that includes individuals who did not exhaust their administrative remedies or seek judicial review within 60 days of receiving the final decision of the Secretary. In this appeal, we challenge both aspects of the district court's judgment.

## A. THE STATUTORY AND REGULATORY FRAMEWORK

### 1. *Substantive Provisions*

The statutory provisions at issue in this case were in effect during one stage in the gradual evolution and expansion of the provisions of the Social Security Act that authorize the payment of survivor's and other benefits to spouses and former spouses of insured wage earners.

a. The Social Security Act, as enacted in 1935, provided only primary benefits for qualified wage earners. Ch. 531, §§ 201 *et seq.*, 49 Stat. 622 *et seq.* In 1939, Section 202 of the Act (49 Stat. 623) was amended to provide secondary benefits for wives, dependent children, widows and surviving dependent parents. Ch. 666, § 201, 53 Stat. 1363. The Act as so amended provided that widows and other secondary beneficiaries would lose their entitlement to monthly benefits if they married. § 202(e)(1)(A) of the Act (§ 201, 53 Stat. 1365); see also § 202(c)(1) and (f)(1) of the Act (§ 201, 53 Stat. 1364 and 1366). In 1950, Congress added Section 202(c) and (f) to the Act to provide secondary benefits for husbands and widowers. Ch. 809, § 101(a), 64 Stat. 483, 485.[1] As in the case of widows, widowers lost their entitlement to benefits upon remarriage. § 202(f)(1)(A) of the Act (§ 101(a), 64 Stat. 485). In 1958, however, Congress enacted an exception to this remarriage rule, providing that if a widow or widower married an individual who also was entitled to receive certain secondary benefits under the Act, he or she would not lose the entitlement to survivor's benefits. § 202(e)(4)(A) and (f)(4) of the

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[1] A husband or widower was entitled to receive benefits only if he previously had received one-half of his support from his wife. In *Califano* v. *Goldfarb*, 430 U.S. 199 (1977), this Court held that the requirement that widowers, but not widows, show such support unconstitutionally discriminated on the basis of sex. Congress thereafter repealed the dependency requirement for widowers. Pub. L. No. 95-216, § 334(d)(1), 91 Stat. 1545; 42 U.S.C. 402(f)(1). See *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 2.

Act, as added by Pub. L. No. 85-840, § 307(b) and (c), 72 Stat. 1031. See *Califano* v. *Jobst*, 434 U.S. 47, 51 (1977).

b. In 1965, Congress amended Section 202(b) of the Act to make a divorced wife eligible for wife's benefits if: (i) she had been married to her former husband for at least 20 years, and (ii) either she received more than one-half of her support from her former husband or there was an agreement or court order in effect that required him to make substantial contributions to her support. Pub. L. No. 89-97, § 308(a), 79 Stat. 375-376. See also § 216(d)(1) of the Act, as added by Pub. L. No. 89-97, § 308(c), 79 Stat. 377. Congress likewise amended Section 202(e) of the Act to permit a divorced wife over age 60 whose former husband had died to receive widow's benefits, but only if she satisfied the same duration-of-relationship and support requirements that a divorced wife had to meet in order to receive wife's benefits while her former husband was still alive. Pub. L. No. 89-97, § 308(b)(1), 79 Stat. 376-377. See also § 216(d)(2) of the Act, as added by Pub. L. No. 89-97, § 308(c), 79 Stat. 377.

Although Congress imposed eligibility restrictions on divorced wives and surviving divorced wives that did not apply to wives and widows, in another respect Congress was especially generous in extending this new coverage to them. In order to prevent any unfairness that might have resulted from the fact that the wage earner's divorced wife and his new wife both might be eligible for wife's or widow's benefits, Congress provided that benefits paid to a divorced wife or surviving divorced wife would not be subject to or counted against the ceiling that otherwise applied to the amount of benefits that could be paid on a single wage earner's account at any one time. See § 203(a)(3) of the Act, as added by Pub. L. No. 89-97, § 308(d)(6), 79 Stat. 378-379.

Finally, as under the preexisting rule affecting widows, Congress provided that a divorced wife or surviving divorced wife could not receive wife's or widow's benefits if she remarried, unless she married a man receiving secondary benefits as a dependent widower, dependent parent, or disabled child aged 18 or over. See § 202(b)(1)(C), (3), (e)(1)(A) and (3) of the Act, as amended and renumbered by Pub. L. No. 89-97, § 308(a), (b)(1) and (b)(3), 79 Stat. 375, 376, 377.[2] But at the same time, Congress relaxed the remarriage rule as it applied to widows and widowers. Specifically, Congress provided that if a widow or widower, after reaching age 60, married an individual who was not entitled to receive certain benefits under the Act, he or she would not forfeit survivor's benefits; instead, the benefits were reduced to 50% of the primary wage earner's benefit. See § 202(e)(4) and (f)(5) of the Act, as added by Pub. L. No. 89-97, § 333(a)(1) and (b)(1), 79 Stat. 403 and 404.[3]

c. In 1972, Congress eliminated the requirement that a divorced wife or surviving divorced wife establish either that she received more than one-half of her support from her former husband or that she was the beneficiary of an agreement or court order providing for substantial support. Pub. L. No. 92-603, § 114(a) and (b), 86 Stat. 1348.

d. In 1977, Congress again amended the relevant provisions of the Social Security Act. In that year, it revised Section 202(e)(4) and (f)(5) of the Act to pro-

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[2] Under these provisions, the survivor's benefits of a divorced wife or surviving divorced wife terminated if she married a person receiving old-age benefits. However, this impact was offset by the fact that, upon remarriage, she became eligible for wife's benefits on her new husband's account. See *Califano* v. *Jobst*, 434 U.S. at 51 n.6, quoting H.R. Rep. 2288, 85th Cong., 2d Sess. 18 (1958).

[3] As originally enacted, the relevant age for widowers was 62. That age was reduced to 60 in 1972. Pub. L. No. 92-603, § 107(a)(3), 86 Stat. 1343.

vide that if a widow or widower remarried after reaching age 60, the marriage would be "deemed not to have occurred" for purposes of entitlement to survivor's benefits. Pub. L. No. 95-216, § 336(a)(3) and (b)(3), 91 Stat. 1547. This amendment was effective for monthly benefits payable beginning in January 1979. *Id.* § 336(c)(1), 91 Stat. 1547. As a result, since 1979, widows and widowers have been entitled to unreduced survivor's benefits if they remarried after age 60. Congress also amended Section 216(d)(1) and (2) of the Act, effective January 1979, to reduce from 20 to 10 years the period during which a divorced wife or surviving divorced wife is required to have been married to the wage earner in order to be eligible for wife's or widow's benefits. Pub. L. No. 95-216, § 337, 91 Stat. 1548. But Congress retained the provisions that generally barred a divorced wife or surviving divorced wife from receiving benefits upon remarriage, even after reaching age 60. See § 202(b)(1)(C), (3), (e)(1)(A) and (F) of the Act.

e. Although by this time Congress had permitted divorced wives and surviving divorced wives to receive wife's and widow's benefits in certain circumstances, it had not expressly provided for divorced husbands and surviving divorced husbands to receive husband's and widower's benefits. In 1977, the statutory ineligibility of divorced husbands to receive husband's benefits was held unconstitutional under this Court's decisions concerning discrimination on the basis of sex. *Oliver* v. *Califano*, [Jan. 1977-Jan. 1978 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 15,244 (N.D. Cal. June 24, 1977). Thereafter, the Secretary promulgated regulations providing that divorced husbands would be eligible to receive husband's benefits to the same extent as divorced wives were eligible by statute to receive wife's benefits. 44 Fed. Reg. 34480, 34483-34484 (1979); see 20 C.F.R. 404.331. Similarly, in 1980, the ineligibility of surviving divorced husbands to receive widower's benefits was held unconstitu-

tional (*Ambrose* v. *Califano*, [Aug. 1981-Mar. 1982 Transfer Binder] Unempl. Ins. Rep. (CCH) ¶ 17,702 (D. Ore. July 16, 1980)), and the Secretary thereafter promulgated regulations extending benefits to surviving divorced husbands on the same basis that they were provided by statute to surviving divorced wives. See *ibid.*; 20 C.F.R. 404.336. In 1983, as part of a general elimination of gender-based distinctions, Congress amended Section 202(c)(1) and (f)(1) of the Act expressly to make divorced husbands and surviving divorced husbands eligible for husband's and widower's benefits, respectively. Pub. L. No. 98-21, § 301, 97 Stat. 109-112.

f. Finally, also in 1983, Congress amended the Act to provide that surviving divorced wives and husbands who remarry after age 60 may receive widow's or widower's benefits in the same manner as widows and widowers. See § 202(e)(3) and (f)(4) of the Act, as amended and redesignated by Pub. L. No. 98-21, §§ 131(a)(2), (3)(A), (b)(2), (3)(A) and (d)(1), 301(b)(4), 97 Stat. 92, 93 and 111.[4] As a result, otherwise eligible members of the appellee class have been entitled to receive monthly widow's or widower's benefits since January 1984.

### 2. *Procedural Provisions*

Claims for survivor's and other benefits under Title II of the Social Security Act are considered by the Secretary pursuant to special procedures prescribed by Congress and the Secretary. The principal statutory provision pertaining to administrative review is Section 205(b) of the Act, 42 U.S.C. 405(b). That Section directs the Secretary "to make findings of fact, and decisions as to the rights of any individual applying for a

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[4] Congress did not, however, amend the Act to make divorced wives and divorced husbands eligible for wife's or husband's benefits if they remarry after reaching age 60. See § 202(b)(1)(C) and (H) of the Act, and § 202(c)(1)(C) and (H) of the Act, as amended by Pub. L. No. 98-21, § 301(a)(2), 97 Stat. 109-110.

payment" under Title II (42 U.S.C. 405(b)(1)). Section 205(b) further provides that if the individual is dissatisfied with the Secretary's preliminary "decision," the Secretary shall afford him a right to a hearing.

Pursuant to her authority under Section 205(a) of the Act "to make rules and regulations and to establish procedures" (42 U.S.C. 405(a); see also 42 U.S.C. 1302)), the Secretary has fleshed out these general statutory directives by establishing a four-step administrative procedure for review by the Social Security Administration (SSA) of claims for benefits. The four steps are: the initial determination (20 C.F.R. 404.902-404.904); a de novo reconsideration (20 C.F.R. 404.907-404.921); an evidentiary hearing before an administrative law judge (ALJ) (20 C.F.R. 404.944-404.965); and discretionary review by the Appeals Council (20 C.F.R. 404.976-404.983). The Secretary's decision rendered at the initial determination, reconsideration, or ALJ hearing stage is expressly made "binding" on the claimant unless he seeks further administrative review within 60 days (20 C.F.R. 404.905, 404.909(a)(1), 404.920, 404.933(b)(1), 404.955(a), 404.968(a)(1)), and an individual is personally notified that he must seek further administrative review within 60 days if he wishes to challenge that decision. See generally Pet. Br. at 3-6, *Heckler* v. *City of New York*, cert. granted, No. 84-1923 (Oct. 7, 1985).

The four steps culminating in the Appeals Council's disposition "exhaust the claimant's administrative remedies. Thereafter, he may seek judicial review in federal district court." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 3. Under Section 205(g) of the Act, 42 U.S.C. 405(g), the claimant may obtain judicial review of the Secretary's final decision "by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow." If the claimant does not seek judicial review within 60 days of the Appeals Council's decision, that decision (or the ALJ's decision if the Ap-

peals Council denied review) is expressly made "binding" on the claimant. 20 C.F.R. 404.955(b), 404.981.

The Secretary has carved out only one exception to the requirement that a claimant fully exhaust his administrative remedies through the Appeals Council stage before seeking judicial review. *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 2 & n.2. This exception applies if the individual's claim for benefits has been denied at the reconsideration level, if he does not dispute the Secretary's findings of fact or interpretation or application of controlling law, and if the claimant alleges (and the Secretary agrees) that the only factor precluding an allowance of the claim is a statutory provision that the claimant contends is unconstitutional. In such a situation, a representative of the Secretary may enter into a formal agreement with the claimant deeming the reconsideration decision to be the Secretary's "final decision" for purposes of seeking judicial review pursuant to 42 U.S.C. 405(g). 20 C.F.R. 404.923-404.926. The claimant then has 60 days within which to seek judicial review. 20 C.F.R. 404.927. This special procedure was intended to implement the holding in *Weinberger* v. *Salfi*, 422 U.S. 749, 765-767 (1975), that the Secretary may waive the requirement of full exhaustion in such circumstances. See 40 Fed. Reg. 53385 (1975).

## B. THE PROCEEDINGS IN THIS CASE

1. a. Appellee Buenta Owens was married to Russell Judd in 1937 and divorced from him in 1968. In 1978, at the age of 61, she married appellee Kenneth Owens. Judd died on June 19, 1982. On July 30, 1982, Buenta Owens applied for widow's benefits on Judd's earnings account as a surviving divorced wife. Her claim was denied. On October 19, 1982, Buenta Owens sought administrative reconsideration of that denial, contending that the statutory provision denying benefits because of her remarriage was unconstitutional. Her claim again

was denied in a reconsideration determination dated December 7, 1982. J.S. App. 1a, 13a-14a, 31a-32a; B.R. 2, 6-7, 9-10.[5]

Buenta Owens requested that her claim be considered under the expedited administrative appeals procedure provided by the Secretary's regulations, discussed above (see page 9, *supra*). B.R. 9. The designated representative of the Secretary determined that it would be appropriate to use this procedure, and he entered into an agreement with her to that effect on March 3, 1983 (J.S. App. 50a-51a). The agreement stated that Buenta Owens "accepts the factual determinations of the Secretary as contained in the reconsideration determination of December 7, 1982, on the wage record of Russell B. Judd"; that she also "accepts the Secretary's interpretation and application of the Social Security Act contained in the above-referenced reconsideration determination"; and that except for the statutory provisions whose constitutionality she challenges, "the right of the claimant to benefits has been established by the claimant" (*id.* at 50a). On this basis, the agreement provided that "[t]he above-referenced reconsideration determination represents the final decision of the Secretary"; that the agreement "constitutes a waiver by the claimant and the Secretary of the necessity to pursue the remaining steps of the administrative appeal process"; and that she had 60 days within which to file a civil action to raise the constitutional issue (*id.* at 50a-51a). Buenta Owens then filed the contemplated civil action in the United States District Court for the Central District of California on April 19, 1983, within 60 days of the date of the agreement. She sought to represent a nationwide class of surviving divorced spouses. Complaint ¶ 6.

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[5] "B.R." refers to the transcript of the administrative record on the claim of appellee Buenta Owens that was filed in district court pursuant to 42 U.S.C. 405(g). "K.R." refers to the transcript of the administrative record on the claim of appellee Kenneth Owens.

b. Appellee Kenneth Owens was married to Dorothy L. Owens in 1934 and was divorced from her in 1978. He then married appellee Buenta Owens in 1978, when he was 60 years old. On July 15, 1982, Kenneth Owens applied for survivor's benefits based on the earnings account of his former wife, who had died. His claim was denied at the initial determination stage and in a reconsideration decision dated May 12, 1983. He likewise requested to use the expedited administrative appeals procedure, and on November 23, 1983, a representative of the Secretary entered into an agreement with him under that procedure. J.S. App. 14a, 32a, 52a-53a; K.R. 1-2, 14-18, 31, 34. On January 6, 1984, within 60 days of the date of the agreement, Kenneth Owens filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the statutory provisions. His class action subsequently was consolidated with that filed by his wife (J.S. App. 13a-15a).

2. a. In an opinion dated December 23, 1983—before Kenneth Owens filed suit—the district court at first rejected Buenta Owens' constitutional challenge to the statutory provisions (J.S. App. 1a-12a). The court declined to engage in strict scrutiny of the challenged provisions, even though they might create a "disincentive" to marry (*id.* at 5a-7a). The court explained that this Court has applied strict scrutiny only when the government "created substantial legal obstacles to entry into or exit from the marital state" (*id.* at 6a, citing *Zablocki* v. *Redhail*, 434 U.S. 374 (1978), and *Boddie* v. *Connecticut*, 401 U.S. 371 (1971)). By contrast, the district court observed, the Court has applied the rational basis standard in reviewing provisions of the Social Security Act that deny benefits to some persons, but not others, based upon their marital status (J.S. App. 6a, citing *Mathews* v. *De Castro*, 429 U.S. 181 (1976), and *Califano* v. *Jobst*, 434 U.S. 47 (1977)). Applying the rational basis test, the court sustained the statutory distinction (J.S. App. 7a-12a).

It reasoned that, as in *Califano* v. *Jobst*, 434 U.S. at 57-58, Congress reasonably could decide to take one step at a time in removing the perceived hardship of the remarriage rule—lifting it as to widowed spouses effective January 1979 and as to surviving divorced spouses effective January 1984 (J.S. App. 10a-11a).

b. Buenta Owens then filed a motion to alter or amend the judgment. While that motion was pending, the court, by order dated August 28, 1984, certified a nationwide plaintiffs' class. That class consists of all surviving divorced spouses who remarried after age 60 and who were denied monthly benefits for any month after December 1978, provided that the claimant's application was filed on or after August 20, 1982 or that the time within which to seek review of a decision denying an application filed prior to that time had not expired as of August 20, 1982 (J.S. App. 13a-28a; see *id.* at 28a, 44a). The district court acknowledged that 42 U.S.C. 405(g) was the exclusive source of jurisdiction over this suit and that, under *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975), a class may be certified only if each of its members satisfies all of the requirements for judicial review set out in Section 405(g) (J.S. App. 15a-16a). Nevertheless, the court defined the class to include many individuals who had not exhausted their administrative remedies or who had received the Secretary's final decision denying their claims for benefits more than 60 days before this suit was filed.

Citing the regulations pursuant to which the Secretary and appellees Buenta and Kenneth Owens had entered into agreements stipulating that exhaustion would not be required with regard to their own individual claims for benefits, the district court held that the Secretary had thereby waived exhaustion for *all* class members, without regard to whether the Secretary had entered into a similar agreement with each of them (J.S. App. 17a-18a). The court further held that it could in any event excuse a failure to comply with the exhaustion requirement on

a class-wide basis where the constitutionality of a statutory provision was at issue (*id.* at 18a-19a).

The district court treated the statutory requirement that judicial review be sought within 60 days as an ordinary statute of limitations. It then held that the running of the 60-day period should be tolled retroactively for all class members on a nationwide basis as of October 19, 1982, the date on which appellee Buenta Owens sought administrative reconsideration of the initial determination denying her claim for benefits (J.S. App. 20a-21a). In the court's view, the filing of this "single administrative complaint" by Buenta Owens gave the Secretary adequate notice of the constitutional contention and an opportunity to evaluate its effects on similarly situated persons (*id.* at 21a). Accordingly, the court included in the class any individual who had a live claim for benefits pending administratively on or after August 20, 1982, which was 60 days before Buenta Owens requested reconsideration (*id.* at 22a) but more than eight months before she filed the instant action for judicial review pursuant to 42 U.S.C. 405(g).

c. After it certified a nationwide class, the district court, by opinion and order dated October 5, 1984, reversed its prior ruling on the merits and held unconstitutional the challenged distinction between the eligibility of surviving widowed spouses and surviving divorced spouses upon remarriage (J.S. App. 29a, 30a-43a). The court again acknowledged that "[t]he one step at a time argument has considerable allure in this instance because it literally describes Congress' actions here" (*id.* at 39a). But this time the court found that justification insufficient. The court explained that "Congress must have a rational basis for each step it takes," and that the statutory distinction "must stand or fall on whether Congress rationally might have assumed that widowed spouses are generally more dependent on income from the deceased wage earner than are surviving divorced spouses" (*id.* at 40a). The court expressly agreed with

the Secretary that Congress rationally *could* so assume (*id.* at 42a), but it nevertheless held that the challenged distinction was irrational. The court relied on its belief that Congress in 1977 had chosen to treat surviving widowed spouses and surviving divorced spouses in the same manner upon the death of the primary wage earner. In light of that action by Congress, the court found no "logical basis" to distinguish between those two classes of individuals upon their subsequent remarriage (*ibid.*).

As relief, the district court enjoined the Secretary from applying the challenged provisions to appellees Buenta and Kenneth Owens and other eligible class members, ordered her to pay retroactive benefits to the named appellees, and directed her to determine and assure payment of survivor's benefits to other class members within 120 days (J.S. App. 44a-46a).[6]

## SUMMARY OF ARGUMENT

I. Throughout the history of the Social Security program, Congress has distinguished between spouses who have remained married and those who have divorced. It was not unconstitutional for Congress to draw on that established distinction by providing, between 1979 and 1983, that widowed spouses, but not surviving divorced

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[6] By order entered July 11, 1985, the district court granted a stay pending appeal of those portions of its judgment that required the Secretary to pay benefits to the unnamed class members, but the court ordered the Secretary to identify all class members and to adjudicate their claims pending appeal. We have been informed by HHS that in order to identify the claimants who are members of the class, HHS first used computer coding to identify a total of 13,641 potential class members. The claims file of each of these individuals then had to be manually reviewed to determine whether the claimant was a surviving divorced spouse who remarried after reaching age 60 and who otherwise fell within the class definition. In a status report filed on December 2, 1985, the Secretary informed the district court that 13,048 of these individual claims files had been reviewed and that 533 eligible class members had been identified in that process.

spouses, who remarry after reaching age 60 may retain their eligibility for survivor's benefits.

A. Statutory classifications that base eligibility for secondary benefits under the Social Security Act on marital status are not inherently invidious and do not impinge on fundamental rights. Accordingly, the statutory provisions at issue here must be sustained because they do not "manifest[] a patently arbitrary classification, utterly lacking in rational justification." *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960).

B. Appellees were denied survivor's benefits because of the combined presence of two factors: their divorce from the primary wage earner, and their subsequent marriage to another spouse. Each of these factors has been sustained by this Court as a constitutionally permissible basis on which to distinguish between classes of potential secondary beneficiaries. In *Califano* v. *Jobst*, 434 U.S. 47 (1977), the Court held that the uniform rule in effect under the Social Security Act prior to 1958 that terminated all secondary benefits upon remarriage was "unquestionably valid" (434 U.S. at 54), because Congress rationally could determine that a married person is less likely to be dependent upon his prior family unit than is an unmarried person. *Id.* at 53. Similarly, in *Mathews* v. *De Castro*, 429 U.S. 181, 188 (1976), the Court held that Congress rationally could assume that "divorced husbands and wives depend less on each other than do couples who stay married." See also *Califano* v. *Boles*, 443 U.S. 282, 289-293 (1979).

C. The district court acknowledged that under *De Castro* and *Boles*, Congress rationally could conclude that surviving divorced spouses generally are less dependent upon the resources of their former spouses than are widows and widowers. But the court held that because Congress chose to treat widowed spouses and divorced spouses identically upon the death of the primary wage earner, it was irrational for Congress to distinguish be-

tween them upon remarriage. The court's reasoning was seriously flawed.

To begin with, Congress has never treated widowed spouses and divorced spouses identically with respect to their initial eligibility for survivor's benefits. Although widows need not establish that they received substantial support from their former husbands, and have been subject to only a minimal one-year duration-of-marriage requirement, divorced wives, from the outset of their eligibility in 1965, have been required to meet stringent duration-of-marriage and (until 1972) support criteria. Thus, the court's holding of unconstitutionality was based on a mistaken, albeit critical, premise. Moreover, the difference in treatment upon remarriage was not new in 1977, as the district court also seemed to believe, because Congress had relaxed the remarriage rule for widows and widowers in 1965.

In any event, the fact that Congress chose to make a limited category of divorced spouses eligible for survivor's benefits does not mean that Congress actually found them to be situated identically to widowed spouses. Congress presumably found only that their circumstances were sufficiently alike to justify similar treatment upon the death of the wage earner. It was not inconsistent with that legislative judgment for Congress also to believe that there were significant differences between the two categories and to give effect to those differences upon remarriage.

It often is necessary for Congress to proceed one step at a time in extending benefits to new categories of beneficiaries under the Social Security Act. Congress's decision to include widowed spouses, but not surviving divorced spouses, in the step it took in 1977 is supported by a number of relevant factors, in addition to the difference in their dependence upon the resources of the former spouse. First, a divorced spouse's ties to the wage earner's family unit were legally severed. Second, a di-

vorced spouse who remarries reasonably may be expected to look to his or her new spouse, not to the former spouse's Social Security account, for needed support, since alimony and support payments also commonly terminate upon remarriage; by contrast, a widowed spouse does not typically forfeit his or her interests deriving from the former marriage (*e.g.*, an interest in the deceased spouse's estate) upon remarriage. Third, remarriage is an appropriate occasion to terminate the potential for a substantial drain on the Trust Fund caused by the multiple eligibility of both the wage earner's divorced spouse and his or her new spouse.

II. The district court erred in granting relief to a nationwide class of claimants. The named appellees satisfied the jurisdictional prerequisites to suit under 42 U.S.C. 405(g), because the Secretary formally designated the denial of their claims at the reconsideration level as her "final decision" and they then sought judicial review within 60 days. But the district court disregarded this Court's holdings that each unnamed class member also must individually satisfy the final decision and 60-day filing requirements in 42 U.S.C. 405(g).

A. Because there is no allegation that each of the unnamed class members received a final decision from the Appeals Council, as required by governing regulations, the district court had no jurisdiction over their claims. The district court's conclusion that it was unnecessary for the class members to obtain a final decision because exhaustion would have been futile was directly contrary to this Court's holding in *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), that a final decision is a "statutorily specified jurisdictional prerequisite" that "may *not* be dispensed with merely by a judicial conclusion of futility" (*id.* at 766 (emphasis added)).

The Court held in *Salfi* that the *Secretary* could dispense with exhaustion in certain circumstances, and the Secretary thereafter established a procedure for doing so. Pursuant to that procedure, the Secretary entered into

agreements with the two named appellees, in which she stipulated that only the question of the constitutionality of the statutory provisions remained and that the denial of their claims at the reconsideration level was her "final decision." However, none of the unnamed class members invoked that procedure for obtaining judicial review without full exhaustion of administrative remedies, and they therefore did not obtain a final decision on their claims. Contrary to the district court's belief, the mere existence of an administrative procedure for *case-by-case* waiver of the exhaustion requirement did not amount to a *blanket* waiver of exhaustion for all members of the class merely because they presented a constitutional challenge.

B. The district court also erred in including in the class claimants who received a final decision of the Secretary more than 60 days before this class action was filed. None of the unnamed class members requested the Secretary to exercise her authority under 42 U.S.C. 405(g) to extend the 60-day filing period. The district court's view that the running of the 60-day period nevertheless could be judicially "tolled" on a nationwide basis from the date on which a single claimant (appellee Buenta Owens) filed a request for administrative reconsideration would seriously disrupt the sound administration of the Social Security program.

Practical considerations aside, the district court had no authority to impose its unprecedented tolling rule. Like the "final decision" requirement in Section 405(g), the requirement that judicial review be sought within 60 days of "such decision" is a jurisdictional prerequisite to suit that may not be dispensed with by a court. Moreover, limitations on the time within which a suit may be brought against the government must be strictly construed, and therefore a court is not empowered to fashion a tolling rule that Congress has not prescribed.

## ARGUMENT

### I. CONGRESS RATIONALLY COULD DISTINGUISH BETWEEN WIDOWED SPOUSES AND SURVIVING DIVORCED SPOUSES FOR PURPOSES OF THEIR CONTINUED ELIGIBILITY FOR SURVIVOR'S BENEFITS UPON REMARRIAGE AFTER AGE 60

Throughout the history of the Social Security program, Congress has treated widowed spouses and divorced spouses differently with respect to their eligibility to receive benefits based on their former spouses' earning accounts. This case concerns one aspect of that differing treatment that was in effect between 1979 and 1983. Specifically, effective in January 1979, Congress provided that a widower or widow who remarried after reaching age 60 would retain full eligibility to receive survivor's benefits based on his or her former spouse's account. However, it was not until 1983 that Congress provided that a divorced spouse whose former spouse had died would continue to be eligible for survivor's benefits if he or she remarried after reaching age 60. The district court held that Congress violated the Due Process Clause of the Fifth Amendment because it failed to extend that coverage to divorced spouses in 1979. In the district court's view, since Congress had made both widowed spouses and divorced spouses eligible to receive survivor's benefits when their former spouses died, it was irrational for Congress in 1979 to distinguish between them upon their subsequent remarriage.

This Court has made clear, however, that Congress rationally could determine that divorced husbands and wives depend less on each other than do couples who remain married. *Mathews* v. *De Castro*, 429 U.S. 181, 188 (1976). As the district court expressly acknowledged, Congress also rationally could determine that this difference in the degree of dependence continues after the death of the primary wage earner (J.S. App. 42a). If this much is conceded, Congress surely could conclude

that this difference remains even after remarriage, and therefore that only widowed spouses should continue to be entitled to survivor's benefits after they remarry. Contrary to the district court's apparent belief, the fact that Congress, in its discretion, chose to treat widowed spouses and certain divorced spouses in a similar manner for one purpose (their entitlement to survivor's benefits upon the death of the primary wage earner) does not mean that those categories are constitutionally indistinguishable for all purposes or that Congress was somehow estopped from treating them differently as regards their entitlement to survivor's benefits upon remarriage.

### A. The Statutory Distinction Must Be Sustained Unless It Is Wholly Irrational

The constitutional principles that govern the resolution of this case are firmly established. "Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems." *Schweiker* v. *Wilson*, 450 U.S. 221, 230 (1981).

The distinction involved in this case between widowed spouses and divorced spouses is not inherently invidious. Distinctions based on marital status are common in our legal order, and they manifest both a special regard for marriage as an institution and a practical recognition of the family unit as a common basis for the arrangement of human affairs. *Zablocki* v. *Redhail*, 434 U.S. 374, 384 (1978); *Maynard* v. *Hill*, 125 U.S. 190, 205, 211 (1888). The statutory provisions at issue likewise do not impinge on the exercise of a fundamental right to marry. As the district court correctly recognized (J.S. App. 5a-7a, 36a-38a), it is only where the government has imposed legal restrictions that significantly and directly interfere

with the decision to enter into marriage that this Court has subjected the governmental action involved to rigorous scrutiny. See, *e.g.*, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); *Zablocki* v. *Redhail*, 434 U.S. at 386-387. Rules of eligibility for Social Security benefits based on marital status do not have that effect. In fact, this Court already has sustained the constitutionality of the general rule under the Social Security Act that secondary benefits are terminated upon marriage, even though that rule "may have an impact on a * * * beneficiary's desire to marry, and may make some suitors less welcome than others." *Califano* v. *Jobst*, 434 U.S. 47, 58 (1977). See also *Zablocki* v. *Redhail*, 434 U.S. at 386-387 n.12.

Because there are no factors in this case that could trigger heightened scrutiny, the classifications at issue must be sustained under the Due Process Clause unless "the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). See, *e.g.*, *Schweiker* v. *Wilson*, 450 U.S. at 230; *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 177 (1980). This principle has particular force in a challenge to the distribution of Social Security benefits. "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *De Castro*, 429 U.S. at 185, quoting *Helvering* v. *Davis*, 301 U.S. 619, 640 (1937). As the Court explained in *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960):

> Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently

arbitrary classification, utterly lacking in rational justification.

The statutory provisions appellees have challenged plainly do not suffer from any such defect.

### B. This Court Previously Has Recognized The Rational Basis For The Differing Treatment Of Widowed And Divorced Spouses Involved In This Case

The purpose of the secondary benefit provisions of the Social Security Act is "to afford more adequate protection to the family as a unit" by providing benefits to the members of the wage earner's family who may have become dependent upon him. H.R. Rep. 728, 76th Cong., 1st Sess. 7 (1939); S. Rep. 734, 76th Cong., 1st Sess. 7-9, 11 (1939). See *Califano* v. *Jobst*, 434 U.S. 47, 52 (1977); *Califano* v. *Goldfarb*, 430 U.S. 199, 208-209, 213 (1977) (plurality opinion). However, Congress has not adopted a test of eligibility for secondary benefits that requires an individualized showing of need. Instead, it has "elected to use simple criteria, such as age and marital status, to determine probable dependency." *Jobst*, 434 U.S. at 52 (footnote omitted).

In this case, each of the two factors upon which appellees' ineligibility for survivor's benefits was based—their divorce and their subsequent remarriage—long has been utilized in determining entitlement to secondary benefits under the Social Security Act, and each already has been sustained by this Court as an independently sufficient basis for distinguishing between classes of potential beneficiaries. It therefore cannot have been irrational for Congress to withhold Social Security benefits from the members of the appellee class because of the presence of *both* of these independently sufficient factors.

1. In *Califano* v. *Jobst*, *supra*, the Court held that the uniform rule prior to 1958, under which Social Security benefits payable to all secondary beneficiaries were automatically terminated upon remarriage, was "unquestion-

ably valid." 434 U.S. at 54. The Court explained (*id.* at 53):

> Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status. Traditionally, the event not only creates a new family with attendant new responsibilities, but also modifies the pre-existing relationships between the bride and groom and their respective families. Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.

In the present context, Congress likewise could rationally conclude that a divorced spouse who remarries is less likely to be dependent upon the resources of his or her former spouse than one who does not remarry. For this reason, Congress's decision to terminate the entitlement of divorced spouses to secondary Social Security benefits if they remarry is plainly rational.

2. The district court did not dispute that Congress constitutionally may terminate a person's entitlement to secondary benefits upon remarriage. But the court held that Congress was foreclosed from doing so after 1979 with regard to surviving divorced spouses who remarry after reaching age 60 because Congress in 1979 permitted widowed spouses who remarry after reaching that age to receive survivor's benefits. The court concluded that Congress could not rationally treat divorced spouses differently (J.S. App. 42a). That holding ignores both the significance Congress long has attached to divorce as it affects eligibility for Social Security benefits and this Court's conclusion that it is constitutional for Congress to do so.

In *Mathews* v. *De Castro*, *supra*, the Court unanimously sustained the constitutionality of provisions of the Social Security Act that provided for the payment of benefits to

a married woman under age 62 whose husband retires or becomes disabled if she has a minor or other dependent child in her care, but not to a *divorced* woman in similar circumstances whose *former* husband has retired or become disabled. The Court explained (429 U.S. at 188):

> Divorce by its nature works a drastic change in the economic and personal relationship between a husband and wife. Ordinarily it means they will go their separate ways. Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married.

See also *Califano* v. *Boles*, 443 U.S. 282, 289-293 (1979).

It is clear from *De Castro* and *Boles* that Congress constitutionally could have declined to extend secondary Social Security benefits to *any* divorced spouses. Appellees concede as much (Mot. to Dis. or Aff. 15). In fact, Congress did exactly that for the first 25 years of the Social Security program: although Congress provided benefits for wives and widows in 1939, it was not until 1965 that Congress provided benefits for divorced wives and surviving divorced wives. See pages 4-5, *supra*. If this distinction between spouses who remained married and spouses who were divorced is valid as a general matter, it certainly was not "patently arbitrary" for Congress to invoke that distinction for purposes of determining eligibility for survivor's benefits upon remarriage.

### C. Congress's Decision To Permit Certain Divorced Spouses As Well As Widowed Spouses To Receive Survivor's Benefits Upon The Death Of The Primary Wage Earner Did Not Disable Congress From Distinguishing Between Widowed And Divorced Spouses After Remarriage

The district court expressly agreed with the Secretary that, in light of *De Castro* and *Boles*, Congress rationally could assume that surviving divorced spouses are generally less dependent upon the resources of their former

spouses than are widows and widowers (J.S. App. 42a). But the court held that because Congress had chosen to treat widowed spouses and divorced spouses in an identical manner upon the death of the primary wage earner, it could not thereafter distinguish between them if they remarried (*ibid.*). This reasoning is seriously flawed in a number of respects.

1. To begin with, Congress has never treated widowed spouses and surviving divorced spouses "identically" with respect to their eligibility to receive survivor's benefits upon the death of the primary wage earner. Thus, the entire premise of the district court's constitutional ruling is mistaken.

a. Congress in 1965 did not provide for the payment of secondary benefits to *all* divorced women or adopt eligibility criteria that were identical to those applicable to women who remained married. Instead, Congress focused its concern on those divorced women—particularly housewives who had not worked and earned Social Security protection of their own—whose marriages ended after many years, when they might be "too old to build up a substantial social security earnings record even if [they] can find a job." H.R. Rep. 213, 89th Cong., 1st Sess. 92-93 (1965); S. Rep. 404, 89th Cong., 1st Sess. 107-108 (1965). See *Califano* v. *Boles*, 443 U.S. at 291-292 & n.9, quoting S. Rep. 92-1230, 92d Cong., 2d Sess. 142 (1972).[7] Consistent with its particular concern for this limited category of divorced wives, Congress provided in 1965 that a divorced woman could receive secondary benefits (in the form of wife's or widow's benefits) only if she (i) had been married to her former husband for at

[7] As we have explained, Congress in 1965 did not provide for the payment of secondary benefits to divorced husbands and surviving divorced husbands. Those benefits became available only after Congress's omission of them was held unconstitutional in 1977 and 1980 under this Court's decisions addressing statutory distinctions on the basis of sex. Congress thereafter amended the Act in 1983 expressly to provide for such benefits on equal terms. See pages 6-7, *supra*.

least 20 years, and (ii) either received substantial support from him or there was a court order in effect requiring the payment of such support. See page 4, *supra*. By contrast, it was not necessary for a woman who remained married to demonstrate actual dependence in order to receive wife's or widow's benefits, and the duration-of-marriage requirement, which generally was only one year (see 42 U.S.C. (1964 ed.) 416(b) and (c)), had the distinct purpose of protecting against sham marriages entered into for the purpose of receiving benefits. *Weinberger* v. *Salfi*, 422 U.S. 749, 776-780 (1975).[8]

In view of these significant differences in the eligibility criteria, it is obvious that Congress perceived substantial differences in the extent to which divorced spouses and spouses who remained married should be permitted to share in the receipt of benefits from the Trust Fund. Congress accordingly extended that right only to the limited category of divorced wives who it believed were likely to have been the most dependent on their former husbands for support and thus the most deserving of secondary benefits on their former husbands' accounts.

b. This limited category of divorced wives remained Congress's "core concern" in 1972, when it eliminated the requirement that divorced wives show that they received (or were entitled by court order to receive) substantial support from their former husbands. *Califano* v. *Boles*, 443 U.S. at 291-292. Congress determined that the support requirement had proven to be an obstacle to the receipt of benefits by many of the divorced women whom it believed to be the most dependent, because some state divorce laws did not permit alimony and many divorced wives might have accepted a property settlement in lieu of alimony. See *id.* at 292 & n.9; S. Rep. 92-1230, 92d

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[8] A man was required to establish that he received one-half of his support from his wife in order to receive husband's or widower's benefits (see note 1, *supra*), but the duration-of-marriage requirement likewise was only one year. See 42 U.S.C. (1964 ed.) 416(f) and (g).

Cong., 2d Sess. 142 (1972); H.R. Rep. 92-231, 92d Cong., 1st Sess. 54-55 (1971). The purpose of the 1972 amendments therefore was not to place divorced wives generally on a par with women who remained married—a conclusion that is sufficiently evidenced by the fact that Congress in 1972 retained the stringent 20-year duration-of-marriage requirement for divorced wives.

c. In 1977, when Congress enacted the distinction challenged by appellees, it reduced the duration-of-marriage period for divorced wives from 20 years to 10 years. See page 6, *supra*. But even that 10-year requirement was far more stringent than the minimal duration-of-marriage test applicable to wives, widows, husbands, and widowers.

Thus, contrary to the district court's apparent belief (J.S. App. 42a), differing treatment of spouses who were divorced and spouses who remained married continued to be the norm even with regard to *initial* eligibility for benefits when Congress lifted the remarriage rule to a limited extent for widowed spouses effective in January 1979. Congress's decision to distinguish between these two categories at the time of their remarriage thus was fully consistent with, not an irrational departure from, its uniform practice with respect to their initial eligibility.

2. The next flaw in the district court's reasoning was its further premise, also mistaken, that the difference in the eligibility of widowed spouses and divorced spouses after remarriage was a new concept introduced into the Act in 1977. See J.S. App. 34a-35a, 40a. In fact, it was in 1965—in the very amendments in which Congress extended secondary benefits to divorced wives—that Congress first drew such a distinction. In that year, Congress partially lifted the remarriage rule for widows and widowers by permitting them to receive survivor's benefits at a reduced level if they were remarried after age 60. See page 5, *supra*. Congress did not, however, include a similar provision applicable to divorced wives. Thus, the differing treatment of wid-

owed and divorced spouses upon remarriage, like the differing treatment of those two groups with respect to their initial eligibility, was a feature of the Social Security program from the moment that secondary benefits first were extended to divorced wives in 1965. In this respect as well, then, the district court simply misapprehended the statutory scheme it found irrational.

3. The district court's holding not only rests on mistaken premises about the relative eligibilities of divorced spouses and widowed spouses under the statutory scheme. It also is based on a misguided analysis of the consequences of Congress's decision to extend initial eligibility to certain divorced spouses in the first place.

Contrary to the district court's view, the fact that Congress, in its discretion, elected to afford divorced wives who satisfied certain special qualifications a form of protection that was similar to that afforded women who remained married does not mean that Congress actually found these two categories to be *identically* situated in terms of need or dependency or to have an *identical* equitable claim to share in payments from the Trust Fund. Instead, Congress presumably determined in 1965, 1972, and 1977 only that divorced women within the category with which it was specifically concerned were likely to have been dependent upon their former husbands to a sufficient extent (even if not with the *same* degree of likelihood and to the *same* extent as wives who had remained married to the primary wage earner) to warrant treating them in a manner similar to that in which wives and widows were treated. It is entirely consistent with that legislative judgment for Congress nevertheless to have believed that there also were significant differences between spouses who remained married and those who did not. Accordingly, there was nothing irrational about Congress's continuing to give effect to those differences in the 1977 amendments by treating widowed spouses who remarried after reaching age 60 more favorably than divorced spouses who did so.

4. For the reasons explained above, nothing in the Due Process Clause required Congress to take an all-or-nothing approach when it extended coverage to a new category of secondary beneficiaries (divorced spouses) in 1965 or revised the eligibility criteria for that category in 1972 and 1977. Congress often must proceed one step at a time when expanding coverage under this "complex statutory scheme" (*Jobst*, 434 U.S. at 52).

In particular, Congress's consistent practice has been to proceed cautiously in modifying the general remarriage rule under the Social Security Act. See *Jobst*, 434 U.S. at 54-57. Congress adhered to that pattern in 1977. As the district court acknowledged, the House version of the bill enacted in 1977 contained an "across-the-board elimination of the general marriage rule, covering all secondary beneficiaries, including but not limited to widows and surviving divorced spouses"; this was a "broad change" that in its first year of operation alone would have created "an estimated 670,000 new beneficiaries at a cost of $1.3 billion in additional benefits" (J.S. App. 3a-4a (footnote omitted), citing H.R. Rep. 95-702, 95th Cong., 1st Sess. Pt. I, at 47-48 (1977), and *id.* Pt. II, at 73). No similar provision was contained in the Senate bill, and it is not surprising that the provision was deleted in Conference in favor of a more modest proposal that lifted the marriage rule only for widows and widowers who remarried after reaching age 60. See H.R. Conf. Rep. 95-837, 95th Cong., 1st Sess. (1977).

Congress obviously concluded that widows and widowers were the most deserving of receiving benefits after remarriage, and it chose to "concentrate limited funds where the need [was] likely to be greatest" (*Califano* v. *Boles*, 443 U.S. at 296). Recognition of Congress's discretion to make that choice is but a particular application of the broader principle that a legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). Accord *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S.

456, 466 (1981); *New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976).[9]

Congress's decision to include only widowed spouses, and not surviving divorced spouses, in the category of secondary beneficiaries who would retain their eligibility upon remarriage after age 60 is supported not only by the difference between those two groups with respect to their relative dependence on the primary wage earner, but also by a number of other factors:

First, because the principal purpose of secondary benefits is to afford protection for the wage earner's family as a unit (see page 22, *supra*), the distinction between widowed spouses (whose ties to the wage earner's family unit never were broken) and divorced spouses (whose ties to the family unit were legally severed before he died) conforms to the purposes of the statutory program. Compare *Fritz*, 449 U.S. at 177-178 & n.11. It was permissible in this context for Congress to conclude that widowed spouses had a more substantial stake than did divorced spouses in the distribution of survivor's benefits from the Trust Fund after remarriage.

Second, the payment of secondary benefits assists not only the recipient, but also the primary wage earner, who is thereby assured that protection is provided for his or her family members. See *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 645 (1975); *Califano* v. *Goldfarb*, 430 U.S. at 203-205 (plurality opinion). Congress rationally could determine that when a divorced spouse remarries, the former spouse no longer is primarily responsible for his

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[9] See, *e.g.*, 123 Cong. Rec. 39132 (1977) (remarks of Sen. Long) (the Conference agreement "represents a compromise between the [House and Senate] positions which * * * preserved most of the savings and which also includes those benefit improvements which were of highest priority"); *id.* at 39011 (remarks of Rep. Conable) (the bill "moves in the right direction, by improving ever so slightly the treatment of widows and divorcees"); *ibid.* (remarks of Rep. Archer) ("it is a step forward to permit widows and widowers over 60 years of age to remarry without losing their benefits").

or her support and that the divorced spouse instead should look to the new spouse, not to the former spouse's Social Security insurance, for any necessary support. It is common, for example, for alimony and support payments to a divorced spouse to be terminated when that spouse remarries. See, *e.g.*, Cal. Civ. Code § 4801(b) (West Supp. 1985); Ill. Ann. Stat. ch. 40, § 510(b) (Smith Hurd Supp. 1985); N.J. Stat. Ann. § 2A:34-25 (West 1952); N.Y. Dom. Rel. Law § 248 (McKinney 1977). Especially since the eligibility of divorced spouses for secondary benefits originally was based on their receipt of or entitlement to support or alimony payments, it was reasonable for Congress to conform to the common practice regarding such payments by providing for the termination of secondary Social Security benefits when a divorced spouse or surviving divorced spouse remarried. Cf. *Salfi*, 422 U.S. at 776-777.

By contrast, a widow or widower who remarries does not typically forfeit her or his entitlements deriving from the former marriage—such as an interest in the deceased spouse's estate. It therefore was rational for Congress to permit widowed spouses who remarried after reaching age 60 likewise to continue to receive Social Security benefits based on the deceased spouse's account, even though it did not do so for divorced spouses.

Third, benefits paid to divorced spouses and surviving divorced spouses are not subject to or counted against the overall ceiling on the amount that may be paid on the basis of the primary wage earner's account. 42 U.S.C. 403(a)(3)(C). As a result, if the primary wage earner remarried after his divorce, his or her new spouse and former spouse both might be eligible for the full amount of secondary benefits. It was reasonable for Congress to terminate that potential drain on the Trust Fund at whatever point the divorced spouse or surviving divorced spouse remarried.

4. In sum, as this Court observed in a nearly identical context in *Califano* v. *Jobst*, 434 U.S. at 57-58:

> Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 [(1950)]. Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the [appellees].

Congress might well be deterred from taking similar steps in the future to alleviate what it believes to be the greatest inequities in the Social Security program if its decisions to proceed in a cautious fashion are invalidated because they do not go far enough. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely [the Court] may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97 (footnote omitted). This faith in the democratic process was vindicated in the present case, because Congress enacted legislation to eliminate the distinction appellees challenged almost 18 months *before* the district court declared that distinction unconstitutional. There was no justification for the district court to intervene in the complex legislative adjustment and evolution of the respective eligibility of spouses who remained married and spouses who were divorced.

## II. THE DISTRICT COURT HAD NO JURISDICTION UNDER 42 U.S.C. 405(g) OVER THE CLAIMS OF THE UNNAMED CLASS MEMBERS WHO DID NOT EXHAUST THEIR ADMINISTRATIVE REMEDIES OR WHO RECEIVED THE SECRETARY'S "FINAL DECISION" MORE THAN 60 DAYS BEFORE THIS SUIT WAS FILED

The district court compounded its error on the constitutional issue by granting relief to a nationwide class of surviving divorced spouses whose claims for benefits were not properly before the court. This suit was brought pur-

suant to 42 U.S.C. 405(g), which authorizes an individual to obtain judicial review only of the Secretary's "final decision" on his claim for benefits, and only if a civil action is commenced "within sixty days of the mailing to him of notice of such decision or within such further time as the Secretary may allow." The named appellees, Buenta and Kenneth Owens, satisfied the prerequisites to judicial review set forth in Section 405(g), because the Secretary formally designated the decision denying their claims at the reconsideration level as her "final decision," and each then sought judicial review within 60 days. See pages 10-11, *supra*. The district court therefore properly exercised jurisdiction over the claims of Buenta and Kenneth Owens and reached the merits of the constitutional question in connection with their individual suits.

However, the district court plainly lacked jurisdiction over the claims of the individuals who were included as unnamed members of the class. The district court conceded that in order for a class to be properly certified, each of its members must individually have satisfied the requirements for judicial review prescribed by 42 U.S.C. 405(g). J.S. App. 15a-16a, citing *Califano* v. *Yamasaki*, 442 U.S. 682, 701 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975). Accord *Mathews* v. *Diaz*, 426 U.S. 67, 71 n.3 (1976); *Heckler* v. *Lopez*, 464 U.S. 879, 881 (1983) (Stevens, J., dissenting in part). Yet the district court proceeded to certify a class in complete disregard of the explicit requirements in Section 405(g) that each claimant must have received a "final decision" of the Secretary on his own claim for benefits and must have sought judicial review within 60 days of that final decision.

### A. The District Court Lacked Jurisdiction Over The Claims Of The Unnamed Class Members Who Did Not Fully Exhaust Their Administrative Remedies Through The Appeals Council Stage Or Otherwise Obtain A "Final Decision" Of The Secretary

1. As this Court has held, the existence of a "final decision" by the Secretary is "central to the requisite

grant of subject matter jurisdiction" in 42 U.S.C. 405(g). See *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975); accord *Heckler* v. *Ringer*, No. 82-1772 (May 14, 1984), slip op. 14. Congress did not specify in the Social Security Act itself when the Secretary will be deemed to have rendered her "final decision" on a claim for benefits. The meaning of that term "is left to the Secretary to flesh out by regulation," and she may "specify such requirements for exhaustion as [s]he deems serve [her] own interests in effective and efficient administration" (*Salfi*, 422 U.S. at 766 & n.9 (footnote omitted)).

As the Court repeatedly has recognized, the governing regulations specify that the finality required for judicial review is achieved only after the claimant has pressed his claim through the ALJ and Appeals Council stages of the administrative review process. *Salfi*, 422 U.S. at 765; *Mathews* v. *Eldridge*, 424 U.S. 319, 329 (1976); *Ringer*, slip op. 2. See 20 C.F.R. 404.900(a)(5); page 8, *supra*.[10] There is no allegation in the complaint in this case that each of the unnamed class members obtained a "final decision" from the Appeals Council. The district court therefore "was without jurisdiction over so much of the complaint as concerns the class, and it should have entered an appropriate order of dismissal." *Salfi*, 422 U.S. at 764.

Instead of ordering dismissal of the complaint to that extent, however, the district court excused all of the unnamed class members from complying with the exhaustion requirement. The court did so because, in its view, exhaustion would have been futile (J.S. App. 18a-19a). The district court's action was flatly inconsistent with *Salfi*. There, the Court held that the requirement that the Secretary have rendered her "final decision" on the individual's claim for benefits is a "statutorily specified jurisdictional prerequisite" that "may *not* be dispensed

[10] The background of the exhaustion requirement is discussed in greater detail in the brief for the petitioners (at 19-25) in *Heckler* v. *City of New York*, No. 84-1923. We have furnished counsel for appellees with a copy of our brief in *City of New York*.

with merely by a judicial conclusion of futility" (422 U.S. at 766 (emphasis added)). The Court so held even though the plaintiffs in *Salfi*, like the appellees in this case, filed suit to challenge the constitutionality of a provision of the Social Security Act—a legal issue that was beyond the Secretary's competence to decide.[11]

2. The Court did observe in *Salfi* that "[w]hile a *court* may not substitute its conclusion as to futility for the contrary conclusion of the Secretary, * * * it would be inconsistent with the congressional scheme to bar the *Secretary* from determining in particular cases that full exhaustion of internal review procedures is not necessary for a decision to be 'final' within the language of § 405(g)." 422 U.S. at 766-767 (emphasis added). The Court held that the Secretary properly could dispense with exhaustion in *Salfi* itself because the claimant expressly stated that he had no dispute with the Secretary's findings of fact or application of the relevant provisions of the Social Security Act, and the Secretary had deter-

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[11] The district court observed that "[t]he Third Circuit has interpreted *Salfi* as establishing that if the only issue in a case is a legal issue of constitutionality, no exhaustion is required." J.S. App. 18a, citing *Kuehner* v. *Schweiker*, 717 F.2d 813, 817 (3d Cir. 1983), vacated and remanded, No. 83-1593 (Nov. 5, 1984), and *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333, 345-346 (3d Cir. 1977). Given this Court's explicit holding to the contrary in *Salfi*, we find it incomprehensible that the lower courts could read *Salfi* to support the proposition that a court may dispense with the exhaustion requirement, even over the Secretary's objection, simply because a question of the constitutionality of the Act is involved.

As we explain below, what the Court actually held in *Salfi* is that the Social Security Act does not prohibit the *Secretary* from dispensing with the requirement of full exhaustion through the Appeals Council stage if *she* has determined that all other issues have been resolved and that the only issue remaining is the constitutionality of a provision of the Act. That holding was but a particular application of the controlling principle that the Act leaves to the Secretary the determination of what will be regarded as her "final decision." It is only in this limited sense that the Court in *Salfi* held that exhaustion is not "required" when a constitutional issue is presented.

mined that the only remaining issue concerned the constitutionality of a particular provision of that Act. See 422 U.S. at 764-765, 766-767. The Court explained (*id.* at 765-766 (emphasis added)):

> Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review. See, e.g., [*McKart* v. *United States*, 395 U.S. 185, 193-194 (1969)]. Plainly these purposes have been served once the *Secretary* has satisfied himself that the only issue is the constitutionality of a statutory requirement, a matter which is beyond his jurisdiction to determine, and that the claim is neither otherwise invalid nor cognizable under a different section of the Act. Once a benefit applicant has presented his or her claim at a sufficiently high level of review to satisfy the *Secretary's* administrative needs, further exhaustion would not merely be futile for the applicant, but would also be a commitment of administrative resources unsupported by any administrative or judicial interest.

The Court recognized in *Salfi* that 42 U.S.C. 405(g) contemplates that the Secretary will have rendered her final decision only "after a hearing" and that the Secretary had not held a hearing on the particular claims involved in that case. 422 U.S. at 767. But the Court also recognized that "once the Secretary has determined that the only issue to be resolved is a matter of constitutional law concededly beyond his competence to decide," a hearing would be "futile and wasteful." *Ibid.* Accordingly, the Court held that just as the Secretary may award benefits without requiring a hearing, the statute likewise does not "prevent him from similarly determining in favor of the applicant, without a hearing, all issues with

regard to eligibility save for one as to which he considers a hearing to be useless" (*ibid.*).

Thus, the Court made clear in *Salfi* that the determination whether to dispense with a hearing, like the determination of what constitutes the Secretary's final decision," is the responsibility of the Secretary, not the courts. The Secretary has the express authority under 42 U.S.C. 405(b) to conduct a hearing even if the claimant believes that one is not necessary. That Section not only requires the Secretary to afford the claimant an opportunity for a hearing; it also authorizes the Secretary, "on his own motion," to "hold such hearings * * * as he may deem necessary or proper for the administration" of the program. This provision ensures that even where the constitutionality of a provision of the Social Security Act appears to be in issue, the Secretary will have the opportunity, prior to judicial review, to resolve any factual issues that may linger after the reconsideration stage or to dispose of any other issues that may support either an allowance or denial of the claim but that were not previously considered.[12]

3. Following the decision in *Salfi*, the Secretary promulgated regulations that establish a procedure by which the Secretary may dispense with the requirement of ex-

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[12] Governing regulations provide that if the claimant believes that an oral hearing is unnecessary in his case, he may request the ALJ to decide it on the written record. 20 C.F.R. 464.948(c). The ALJ is required to give such cases "immediate attention." If the ALJ agrees with the claimant, after a review of the file, that an oral hearing is not necessary, he is expected to issue his decision within 30 days of his receipt of the claims file. Social Security Administration, U.S. Dep't of Health and Human Services, *Office of Hearings and Appeals Handbook* Pt. 1, § 1-313(4) (Apr. 1982). See also *id.* Pt. 2, § 2-1331. Thus, even where the Secretary has not dispensed with the ALJ hearing stage altogether, as she did in the cases of appellees Buenta and Kenneth Owens, the completion of that stage may be expedited if the ALJ determines in the circumstances of the particular case that an oral evidentiary hearing is not necessary. However, the ALJ is still required in such a case to render a decision applying the law to the undisputed facts.

haustion through the Appeals Council stage in the circumstances identified in *Salfi*—*i.e.*, where the Secretary has specifically determined that the facts bearing on the particular claim for benefits are not in dispute, the claimant agrees with the Secretary's interpretation of the Act, and the only issue barring payment is a statutory provision that the claimant contends is unconstitutional. 20 C.F.R. 404.926; see page 9, *supra*. In promulgating these regulations, the Secretary explained that where the specified conditions have been satisfied, SSA could be confident that the particular claim for benefits had been presented at a sufficiently high level to afford the agency an opportunity to correct its errors; to have a complete record with respect to the facts, law, and possible alternative bases of entitlement; and to ensure national uniformity. 40 Fed. Reg. 53385 (1975). Compare *Salfi*, 422 U.S. at 765-766. Accordingly, the Secretary determined that if the claim has been scrutinized to this extent, further administrative review would be "clearly futile." *Ibid.*[13]

The procedures the Secretary has prescribed thus assure that the question of exhaustion of administrative remedies will itself be presented to and expressly ruled upon by the Secretary and that judicial review will be available at what would otherwise be an interlocutory stage of the administrative review process only on the basis of a specific determination by the Secretary that the particular claim involved need not be reviewed further. The existence of this administrative procedure also guarantees that the claimant and the Secretary will have

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[13] A request to use the expedited appeals procedure will be denied if SSA determines that the claimant does not satisfy all of the requirements for invoking it. 20 C.F.R. 404.928. In accordance with the Court's admonition in *Salfi* that "a court may not substitute its conclusion as to futility for the contrary conclusion of the Secretary" (422 U.S. at 766), the Secretary has specified that the denial of a claimant's request to pursue the expedited appeals procedure "will not be subject to the right to administrative or judicial review." 40 Fed. Reg. 53385 (1975). See 20 C.F.R. 404.902(k).

formally stipulated to the fact that further exhaustion may be dispensed with *prior* to the claimant's filing of an action in court. That formal stipulation will then make it unnecessary for the parties to engage in the sort of wasteful litigation on the exhaustion question that has occurred in this case and unnecessary for a court to attempt to infer from what might otherwise be ambiguous circumstances whether the Secretary regarded a particular decision rendered prior to the Appeals Council stage as her "final decision." Compare *Salfi*, 422 U.S. at 764-765, 767; *Mathews* v. *Diaz*, 426 U.S. 67, 72-73, 75-77 (1976). By the same token, there is no substantial burden imposed on the claimant by the requirement that he request the Secretary formally to designate the reconsideration determination as her "final decision" before he seeks judicial review.

The special procedure operated as intended to facilitate expedited judicial review of the claims of appellees Buenta and Kenneth Owens. There was nothing to prevent any of the unnamed class members from likewise requesting to use this expedited appeals procedure if they also wanted to challenge the constitutionality of the relevant provisions of the Social Security Act and if there were no other factual or legal issues in dispute on their respective claims. But there is no indication that any of them ever did so. Nor, as we have said, is there any allegation that any of those class members pursued their administrative remedies and obtained a decision from the Appeals Council. The most reasonable inference is that they simply abandoned their claims once they learned that the Act precluded the payment of benefits. Perhaps they—unlike Buenta and Kenneth Owens—believed that the statutory bar that had been brought to their attention was constitutional. That was their decision to make in the separate administrative proceedings each had initiated by filing his own claim for benefits, just as a party who has filed a lawsuit in court has the right to decide what issues to raise and whether to aban-

don his lawsuit. But whatever their reasons for not pursuing their claims, when the unnamed class members allowed the 60-day period for seeking further review at any stage of those administrative proceedings to expire, the individual decisions denying their respective claims for benefits became binding upon them. The district court had no authority to order that they be opened. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977).

4. The district court held, however, that the mere existence of the expedited appeal regulations somehow amounted to a blanket waiver of the exhaustion requirement by the Secretary for all claimants who challenge the constitutionality of a provision of the Social Security Act (J.S. App. 17a-18a). The court therefore concluded that it had jurisdiction over the claims of all of the class members despite their procedural defaults in failing to seek further review on their own individual claims within the 60 days allowed. This conclusion was clearly wrong.

The district court's ruling completely ignored the terms and purposes of the governing regulations, which establish a procedure for expedited administrative appeals on a *case-by-case* basis. This Court has never endorsed the district court's sweeping proposition that the Secretary may be held to have waived exhaustion for all unnamed members of a nationwide class, even though the Secretary has not made the particularized determination required by those regulations (and contemplated by *Salfi*) that further exhaustion is unnecessary on each individual claim for benefits. Exhaustion is not merely a technical requirement in these circumstances; it is an essential feature of the procedure by which the Secretary conclusively resolves any disputed questions of law or fact bearing on a particular claim for benefits, and thereby renders her final administrative judgment on that claim. The expedited appeals procedure enables the Secretary to render such a judgment without the need for an Appeals Council decision. As a result, if a court then holds that

the statutory provision on which the denial of benefits rested is indeed unconstitutional, all that will remain on remand to the Secretary is the payment of benefits, since all other issues would have been resolved in the prior administrative proceedings.

In this case, by contrast, the Secretary did not formally stipulate with respect to each of the unnamed class members, as she did for Buenta and Kenneth Owens, that all issues of fact and law bearing on his individual claim for benefits (other than the constitutional issue) had been finally resolved at what would otherwise have been a preliminary stage of the administrative review process. Accordingly, she did not conclusively determine that each such claimant had been married for the requisite length of time to an insured wage earner, that the claimant remarried only after reaching age 60, that there were no other bases of eligibility or ineligibility, and that the only remaining obstacle to payment was the applicable statutory provision that Buenta and Kenneth Owens challenged in this case. The Secretary therefore had not rendered her final administrative judgment on the claims of those unnamed class members (but only because the claimants involved did not ask her to do so, and instead abandoned their claims).

As a consequence of that default, the district court found it necessary to order the Secretary to reopen those closed claims and to adjudicate these other issues before it could be determined whether the individuals involved actually were entitled to the benefit of the court's constitutional ruling. See J.S. App. 46a. However, the statutory condition that judicial review is available only following the Secretary's "final decision" made "after a hearing" required that those issues be resolved *before* the district court could even assume jurisdiction over any individual class member's claim for benefits. Because this fundamental prerequisite of a "final decision" was lacking, the district court had no jurisdiction over the claims of the unnamed class members, and it was without au-

thority to order the Secretary to reopen and readjudicate them.

### B. The District Court Lacked Jurisdiction To Award Relief To Class Members Who Received A Final Decision Of The Secretary More Than 60 Days Before This Suit Was Filed

The district court included in the certified class any individual who happened to have had a claim for benefits pending before SSA on or after August 20, 1982, even though Buenta Owens did not file this class action until April 19, 1983, almost eight months later (J.S. App. 19a-22a). This aspect of the class certification flies in the face of the requirement in 42 U.S.C. 405(g) that judicial review of the Secretary's final decision on an individual's claim for benefits must be sought "within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

1. The Secretary has promulgated regulations establishing a procedure for the exercise of her authority under 42 U.S.C. 405(g) to extend the 60-day filing period. Under those regulations the claimant first must file a written request with SSA, stating the reasons why he did not seek judicial review within the time allowed. The filing time then will be extended for that claimant if SSA determines that he has established "good cause" for missing the deadline. 20 C.F.R. 404.982, 404.911. There is no indication that any of the class members who received a "final decision" more than 60 days before this suit was filed ever requested the Secretary to extend the filing period pursuant to this procedure. The claims of those class members therefore remain time-barred.

2. The district court nevertheless excused these class members from the requirement that they seek judicial review within 60 days. The court concluded that the running of the 60-day period should be deemed to have been

"tolled" on a nationwide basis from the date on which Buenta Owens requested administrative reconsideration of her claim because, in the court's view, that request sufficiently put the Secretary on notice of the constitutional issue (J.S. App. 21a-22a).[14] This is a truly extraordinary notion that, if accepted by this Court, would wreak havoc in the orderly administration of the Social Security Act.

The rationale adopted by the district court apparently would eliminate the filing deadline whenever a number of claims for benefits raise a common issue of law—a routine occurrence in the administration of a program under which millions of claims are filed annually. And it would do so despite the fact that the individuals excused from meeting the 60-day requirement almost invariably would not have the slightest inkling that another claimant, perhaps at the other end of the country, had raised a similar legal issue in administrative proceedings on a wholly separate claim. This casual and haphazard approach to what Congress intended to be a firm filing deadline would fatally undermine the congressional purpose of eliminating stale claims and establishing repose with respect to the thousands of individual benefit claims that are processed each month. *Califano* v. *Sanders*, 430 U.S. 99, 108 (1977). Compare *United States* v. *Locke*, No. 83-1394 (Apr. 1, 1985), slip op. 9; *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985), slip op. 7-8.

Quite aside from the devastating impact of the district court's unprecedented tolling rule, the court clearly had no authority to impose it.[15] "[T]he United States, as

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[14] The district court did not explain of what value the notice of the constitutional issue would have been to the Secretary, since that issue was beyond her competence to resolve. See *Salfi*, 422 U.S. at 765, 767.

[15] The only appellate authority the district court cited for this novel "tolling" rule was the Ninth Circuit's decision in *Lopez*

sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), quoting *United States* v. *Testan*, 424 U.S. 392, 399 (1976), and *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Consistent with these principles, the Court held in *Salfi* that the "final decision" requirement in 42 U.S.C. 405(g) is a "statutorily specified jurisdictional prerequisite" to suit. 422 U.S. at 766. The requirement that an action for judicial review be commenced within 60 days of the mailing of "such decision" appears in the same sentence as the requirement of a "final decision," and it therefore likewise is a limitation on the subject matter jurisdiction of the district court. Accordingly, a court has no authority to proceed where that 60-day requirement has not been met. *Hyatt* v. *Heckler*, 757 F.2d 1455, 1460-1461 (4th Cir. 1985), petition for cert. pending, No. 85-474; *Hunt* v. *Schweiker*, 685 F.2d 121 (4th Cir. 1982); *Biron* v. *Harris*, 668 F.2d 259, 261 (6th Cir. 1982); *Whipp* v. *Weinberger*, 505 F.2d 800, 801 (6th

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v. *Heckler*, 725 F.2d 1489, 1506-1507 (1984). See J.S. App. 21a-22a. However, this Court unanimously granted a stay of the portion of the judgment in *Lopez* that asserted jurisdiction over the claims of class members who did not satisfy the 60-day filing requirement (*Heckler* v. *Lopez*, No. A-707 (Apr. 30, 1984)), and the court of appeals' decision thereafter was vacated by this Court. *Heckler* v. *Lopez*, No. 84-115 (Dec. 10, 1984).

The district court also relied on class action cases arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* (J.S. App. 21a-22a). That reliance was wholly misplaced. Under Title VII, it is not necessary for each class member to file a charge with the EEOC. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975). Under the Social Security Act, on the other hand, each individual member of a class must file a claim for benefits. *Weinberger* v. *Salfi*, 422 U.S. at 764. When he does so, the exhaustion rule, time limitations and other requirements of the Act and implementing regulations apply to the ensuing administrative and judicial review of that individual claim, and those requirements leave no room for the intrusion of tolling notions by a court.

Cir. 1974). Compare *Block* v. *North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 287 (1983); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *Munro* v. *United States*, 303 U.S. 36, 41 (1938); *Finn* v. *United States*, 123 U.S. 227, 232-233 (1887). But see, *e.g.*, *City of New York* v. *Heckler*, 742 F.2d 729, 737-738 (2d Cir. 1984), cert. granted, No. 84-1923 (Oct. 7, 1985); *Mental Health Ass'n* v. *Heckler*, 720 F.2d 965, 973 n.19 (8th Cir. 1983).[16]

Even if the 60-day requirement in 42 U.S.C. 405(g) were not regarded as a jurisdictional prerequisite in the strictest sense, that consequence would furnish no support for the district court's novel "tolling" rule in this case. Statutorily mandated limitations on the time within which a person may bring suit against the government must in any event be strictly construed, and the courts are not at liberty to fashion tolling rules for which Congress has not provided. *Soriano* v. *United States*, 352 U.S. 270, 275-276 (1957). The fact that Congress expressly vested in the Secretary, not the courts, the authority to extend the 60-day filing period where circumstances warrant makes it particularly clear that Congress intended to foreclose the fashioning of duplicative tolling rules by the courts. Cf. *United States* v. *Locke*, slip op. 9 n.10.

The district court's holding on the 60-day issue also is directly contrary to this Court's ruling in *Califano* v. *Sanders*, *supra*. See *Heckler* v. *Lopez*, 464 U.S. at 881 (Stevens, J., dissenting in part). If a claimant does not seek review within 60 days, he may obtain further consideration of his claim only by requesting the Secretary to reopen the adverse administrative decision. See 20 C.F.R. 404.987-404.995. This Court held in *Sanders* that the Secretary's determination not to reopen an adverse decision that the claimant had allowed to become binding

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[16] We have discussed the jurisdictional nature of the 60-day filing requirement at greater length in the brief for the petitioners (at 41-45) in *City of New York*.

is not subject to judicial review.[17] The Court explained in *Sanders* that a holding permitting judicial review of the Secretary's denial of a request to reopen would "frustrate the congressional purpose, plainly evidenced in [Section 405(g)], to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits"—a limitation that the Court regarded as an aspect of a "policy choice obviously designed to forestall repetitive or belated litigation of stale eligibility claims." 430 U.S. at 108. The nationwide tolling rule fashioned by the district court in this case would frustrate that congressional policy choice far more severely than would judicial review of the denial of an individual request to reopen, which the Court foreclosed in *Sanders*.

## CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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[17] The holding in *Sanders* applies a fortiori where, as here, a district court is asked to exercise jurisdiction over hundreds of time-barred claims of individual claimants who never requested the Secretary to reopen their claim and, indeed, never even personally requested the court to do so.

## APPENDIX

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *.

2. Section 202(e) of the Social Security Act, as in effect when this action was filed and as codified at 42 U.S.C. 402(e), provided in relevant part:

> **Widow's insurance benefits**
>
> (1) The widow (as defined in section 416(c) of this title) and every surviving divorced wife (as defined in section 416(d) of this title) of an individual who died a fully insured individual, if such widow or such surviving divorced wife—
>
> (A) is not married,
>
> (B) (i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423(d) of this title) which began before the end of the period specified in paragraph (5),
>
> (C) (i) has filed application for widow's insurance benefits, or was entitled to wife's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which he died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title, or
>
> (ii) was entitled, on the basis of such wages and self-employment income, to mother's insurance benefits for the month preceding the month in which she attained age 65, and

(D) is not entitled to old-age insurance benefits or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of such deceased individual,

shall be entitled to a widow's insurance benefit for each month, * * *.

* * * * *

(4) If a widow, after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

* * * * *

3. Section 202(f) of the Social Security Act, as in effect when this action and as codified at 42 U.S.C. 402 (f), provided in relevant part:

**Widower's insurance benefits**

(1) The widower (as defined in section 416(g) of this title) of an individual who died a fully insured individual, if such widower—

(A) has not remarried,

(B)(i) has attained age 60, or (ii) has attained age 50 but has not attained age 60 and is under a disability (as defined in section 423 (d) of the title) which began before the end of the period specified in paragraph (6),

(C) has filed application for widower's insurance benefits or was entitled to husband's insurance benefits, on the basis of the wages and self-employment income of such individual, for the month preceding the month in which she died, and (I) has attained age 65 or (II) is not entitled to benefits under subsection (a) of this section or section 423 of this title,

(D) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than the primary insurance amount of his deceased wife,

shall be entitled to a widower's insurance benefit for each month, * * *.

* * * * *

(5) If a widower, after attaining age 60, marries, such marriage shall, for purposes of paragraph (1), be deemed not to have occurred.

* * * * *

4. Section 205(g) of the Social Security Act, as codified at 42 U.S.C. 405(g), provides:

**Judicial review**

Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of

this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary, and it may at any time order additional evidence to be taken before the Secretary, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

5. Section 216(d) of the Social Security Act, as in effect when the action was filed and as codified at 42 U.S.C. 416(d), provided in relevant part:

**Divorced wives; divorce**

(1) The term "divorced wife" means a woman divorced from an individual, but only if she had been married to such individual for a period of 10 years immediately before the date the divorce became effective.

(2) The term "surviving divorced wife" means woman divorced from an individual who has died, but only if she had been married to the individual for a period of 10 years immediately before the date the divorce became effective.

* * * * *

(4) The terms "divorce" and "divorced" refer to a divorce a vinculo matrimonii.

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